No. 11,210

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. JOHNSTON, etc.,
Appellant and Cross-Appellee
(Respondent Below),

vs.

WALTER McDONALD,
Appellee and Cross-Appellant
(Petitioner Below),

BRIEF OF APPELLEE AND CROSS-APPELLANT (Petitioner Below).

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STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS OF COURTS' JURISDICTION.

This is an appeal by the appellant, respondent below, taken on September 21, 1945 (R. 78), from an order of the District Court below (R. 73) refusing to dismiss a petition for a writ of habeas corpus and remanding the appellee, cross-appellant herein and petitioner below, to the U. S. Marshal to be returned to the U. S. District Court for the Eastern District of Michigan for further proceedings upon a 1938 indictment charg-

ing him with a felony. The appeal has been consolidated with the cross-appeal of the appellee taken on October 24, 1945 (R. 86), from said order and from the minute order of the Court below denying his motion to amend said order.

The District Court below had jurisdiction of the proceeding under the provisions of Title 28 USCA, secs. 451, 452 and 453, and the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction to review final orders of the Court below under the provisions of Title 28 USCA, secs. 463(a) and 225(a) (first).

The pleadings necessary to show the existence of the jurisdictions are the petition for the writ (R. 2), the order to show cause (R. 68), the return to the order to show cause (R. 69), the traverse to the return to the order to show cause (R. 70), memorandum and order denying motion to dismiss the petition and remanding petitioner to Michigan (R. 73), the motion to amend the remanding order (R. 80), the order denying the motion to amend the remanding order (R. 84), the appellant's notice of appeal (R. 78) and the cross-appellant's notice (R. 86) of cross-appeal.

STATEMENT OF THE CASE.

Walter McDonald, appellee and cross-appellant herein and petitioner below, was indicted jointly with one, Barnowski, on May 4, 1938, in the U. S. District Court in Michigan. On June 10, 1938, he was ar-

raigned, without counsel, and entered a not guilty plea to the indictment which charged him with the commission of bank robbery. On January 25, 1939, the defendants were tried by jury and found guilty. Both defendants were represented by the same attorney at the trial. On the following day McDonald was sentenced to 35 years imprisonment. He has been in prison ever since, presently being incarcerated in the federal penitentiary at Alcatraz, California, where he is restrained of his liberty by the respondent as the Warden of said prison. He filed a petition for a writ of habeas corpus in the Court below (R. 2) alleging the restraint to be illegal because the judgment of conviction out of which it arose was void because he was deprived of his right to the assistance of counsel in the trial proceeding. An order to show cause issued on the petition. (R. 68.)

The respondent's return to the order to show cause (R. 69) admits all the facts alleged in the petition but prays a denial thereof because a prior application for a writ (R. 125) made by the petitioner in proceeding No. 23,414 had been denied by the Court below.* The petitioner filed a traverse thereto. (R. 70.) Consequently, the only defense to the application is that tendered by the return to the order to show cause and this is limited to a question whether the issue raised by the petition is foreclosed because proceeding No. 23,414 had been resolved against him.

*The petition in No. 23,414 (R. 89) tendered issues different from the instant one. It attacked the validity of a sentence for duplicity. It was denied (R. 126) and the denial was affirmed on appeal by this Court in *McDonald v. Johnston*, 149 Fed. (2d) 768.

Thereafter the Court below, by a memorandum opinion (R. 73), refused to dismiss the petition and made a finding that the petitioner had been deprived of his right to counsel in the Michigan trial proceeding and ordered him remanded to the custody of the United States Marshal to be returned to the Michigan District Court for further proceedings on the indictment. The respondent appealed. (R. 78.) Thereafter, the petitioner moved the Court below to amend the findings and judgment under Rule 52 R.C.P. so as as to provide for the discharge of the petitioner. (R. 80.) This motion was denied for want of jurisdiction in that Court to pass upon the merits of the motion occasioned by the filing of the respondent's notice of appeal. (R. 84.) Thereafter, the petitioner cross-appealed from said remanding order and from the minute order denying his motion to amend it. (R. 86.) Thereafter he moved this Court to dismiss the appeal upon the ground that it had been taken from an interlocutory order and this Court denied the motion.

QUESTION INVOLVED.

Can a Court, sitting in habeas corpus, refuse to discharge a petitioner held under an unlawful commitment and order him remanded to a committing Court in another jurisdiction to stand trial on an indictment charging bank robbery when he has been unlawfully imprisoned under a void judgment of conviction for eight years and has not been and now cannot be accorded his constitutional guaranty of a speedy trial thereon?

SPECIFICATION OF ERRORS.

The cross-appellant specifies as error and intends to urge the Court below erred in failing to order the cross-appellant discharged from custody and in ordering him (R. 73) remanded to the custody of the U. S. Marshal to be returned to the U. S. District Court for the Eastern District of Michigan for further proceedings on a 1938 indictment against him and in denying his motion (R. 84) to amend said order so as to provide for cross-appellant's discharge from custody.

ARGUMENT.

PROCEDURE IN HABEAS CORPUS PROCEEDINGS.

There is no authority whatever supporting the respondent's assertion that a writ must issue and a hearing be had in habeas corpus proceedings. On the contrary, the first judicial action to be taken on a petition is to determine its sufficiency and to dismiss it "if it appears from the petition itself that the party is not entitled" to an award of the writ. Title 28 USCA, sec. 455. No writ issues in such a case and no hearing is held thereon.

If the petition states grounds for an award of the writ the Court issues a writ of habeas corpus or, in the alternative, an order (rule) to show cause thereon. If the writ issues the respondent may do one of two things. He may produce the petitioner in Court which, in itself, is an answer to the writ necessitating the introduction of evidence or he may file a return thereto

controverting the facts and produce the petitioner in Court whereupon a hearing on the factual merits ensues, the petitioner being entitled to file a traverse to the return. See 28 USCA, secs. 456-460.

The function of the writ, as recited on its face, is to cause a disclosure of the reasons for the detention and the production of the body of the prisoner in Court. It serves no other purpose. The disclosure of the reasons for the detention is to enable the Court to determine from the pleadings whether factual issues require hearing and a determination. The production of the body of the prisoner is designed to transfer custody of the prisoner from the jailor to the Court. If a prisoner's rights can be determined on the pleadings without his presence in Court being necessitated and without the testimony of witnesses being taken why should a Court order him produced and then waste time going through the perfunctory formality of listening to testimony on ultimate facts which are not disputed? The appellant herein contends such a hearing is required. The cross-appellant contends the law does not require such a performance.

If an order to show cause issues in lieu of the writ the respondent does not produce the body of the petitioner but files a return to the order to show cause which the applicant may traverse. This practice is authorized. See *Walker v. Johnston*, 312 U. S. 275. The return to the order puts in issue the sufficiency of the application. If it then appears from these pleadings that there is no provable cause of action the petition is dismissed. But if it then appears that the

application is sufficient and the return thereto admits or fails to deny the material facts the prisoner is entitled to an order releasing him from custody without a hearing on the facts being required. There is no necessity for a writ issuing in such a case unless the respondent refuses to obey the releasing order. If the respondent refuses to obey the order the Court may direct the issuance of the writ. Thereupon the respondent, in obedience to the writ, produces the petitioner in Court. The custody of the body of the petitioner thereupon passes from the respondent to the Court and the Court may release the petitioner from its own custody without going through the useless formality of a hearing on the merits, there being no factual issues requiring a hearing.

Warden James A. Johnston is an officer of national reputation and would obey a releasing order. If he were to refuse to honor the order the writ would issue and the petitioner would be delivered into the custody of the Court by the respondent and thereupon would be entitled to his discharge in open Court. (A refusal to comply with the order also might give rise to contempt proceedings.)

That a hearing is not required where there are no factual issues to be passed upon and matters of law alone are to be determined is demonstrated by the following paragraph in *Walker v. Johnston,* 312 U. S. 275, 284, viz.:

> "It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it.

> Since the allegations of the petition are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grants of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts and from uncontrovertible facts such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts."

In urging that the Court below should have directed a writ to issue and to have conducted a hearing on the facts the respondent tacitly concedes that the order below refusing to dismiss the petition and remanding the cross-appellant to Michigan was a mere interlocutory order. Consequently, we insist, on the strength of the rule announced in *Collins v. Miller,* 252 U. S. 354, that the respondent's appeal does not lie and must be dismissed for want of jurisdiction in this Court to entertain it. A similar conclusion is not reached as to the cross-appeal, however, for reasons pointed out in our motion to remand the cause with directions to the Court below.

NO TRIABLE ISSUES OF FACT EXISTED.

The respondent now asserts that the filing of a return of any nature whatever puts in issue every material fact of a petition. (See page 9 of his Brief.) Such of course is not the case. Those facts only which are denied are put in issue. His return raises the single defense that the petition was barred by the prior proceeding No. 23,414 which had been resolved against the petitioner. Whether the doctrine of *res judicata* applied to the case did not depend upon a hearing on facts. It was a simple matter of ascertaining from the face of the pleadings whether or not that issue had been raised and decided in the prior application. (As hereinafter argued, the doctrine of *res judicata* is inapplicable to habeas corpus proceedings in any event.)

The return to the order to show cause, by its failure to controvert the alleged deprivation of counsel, admitted the deprivation. In addition, the very proof mentioned in the return and upon which the respondent relied to prove there had not been a denial of counsel was the record in proceeding No. 23,414. However, that proceeding related to an attack upon the validity of a sentence and in nowise involved the question of a denial of counsel. (See R. 89, 97, 120, 125 and 128.) (The whole of that record has been incorporated in the Transcript of Record herein although it does not properly form a part thereof. It is, however, a matter of which the Court below had judicial cognizance.)

The respondent argues that the Court below could not take judicial cognizance that the return to the

order to show cause admitted the material facts alleged in the petition, an argument obviously without merit. He also argues that it could not take judicial notice that the pleadings in proceeding No. 23,414 which once had been before it did not involve a question of a denial of counsel. At the same time he insists it should have taken judicial notice that the petitioner's failure to assert a denial of counsel therein barred him from raising that point in his present application. We believe his contentions to be without merit.

THE COURT BELOW EXERCISED ITS DISCRETION IN REFUSING TO GIVE CONTROLLING WEIGHT TO DENIAL OF PRIOR APPLICATIONS.

Following the submission of the cause to the Court below the respondent learned that the petitioner had filed two prior applications for writs in District Courts in the Tenth Judicial District. In his points and authorities he urges that these applications, decided adversely to the petitioner, barred the petitioner's present application. His theory is that successive applications for the writ, although based upon different factual or legal grounds, are barred by a rule announced by this Court in *Swihart v. Johnston,* 150 Fed. (2d) 721. However, no such rule was announced therein. That opinion, following the rule established in *Loisel v. Salinger,* 265 U. S. 134, 137, announced that the doctrine of *res judicata* did not apply to habeas corpus proceedings and declared that a district judge might, in the exercise of his discretion,

consider and give controlling weight to "a prior refusal to discharge on a like petition". That rule was followed in *Beard v. Bennett* (CA-DC), 114 Fed. (2d) 578; *Pope v. Huff* (CA-DC), 141 Fed. (2d) 727; *Dorsey v. Gill* (CA-DC), 148 Fed. (2d) 857, 870. In accordance with that rule the Court below, in a proper exercise of its judicial discretion, gave ample consideration to the prior applications of McDonald and properly refused to give controlling weight to the prior refusals of the Courts to discharge him. Wherefore, we assert that this Court is not empowered to interfere with the exercise of the discretionary power lodged in the Court below. (*Hudson v. Parker,* 156 U. S. 277; *In re Parsons,* 150 U. S. 150; *Ex parte Brown,* 116 U. S. 401.)

In the *Swihart* case this Court expressed the erroneous opinion that a petitioner should not be permitted to reserve known issues to be raised in a later petition. However, in *Waley v. Johnston,* 316 U. S. 101, the Supreme Court recognized the right of a person to reserve questions to be raised in subsequent petitions. See also footnote in *Hawk v. Olson,* 66 S. Ct. 116, where the Supreme Court viewed the doctrine of *res judicata* and successive applications for the writ as having no bearing on a subsequent application. In *Kerr v. Squier,* 151 Fed. (2d) 308, 310, this Court, following the rule in the *Waley* case, modified its own opinion in the *Swihart* case, in the following language:

> "the adjudication of a prior petition for release from imprisonment for the same crime, does not

make res judicata any matters there decided, much less make adjudicated all the rights to release which could have been but were not presented in that prior petition. *Waley v. Johnston*, 316 U. S. 101."

SUCCESSIVE APPLICATIONS FOR THE WRIT ARE PERMISSIBLE.

In further answer to the contention that successive applications for the writ may not be made we direct attention to the fact that Section 9 of Article I of the Constitution prohibits the suspension of the privilege of the writ except when in cases of rebellion or invasion the public safety requires a suspension. No power is vested in the judicial branch of the government to suspend the writ by direction or indirection in any case whatsoever. That prohibition has as much constitutional dignity as has the vestiture of judicial power in the Courts. If Congress may broaden but not narrow the privilege of the writ it would seem to follow that the judicial branch may broaden but not narrow it. If Congress may not suspend the privilege of the writ whence does the judicial branch derive authority to suspend it upon a plea that it is empowered to legislate against successive applications for it? Nowhere in the long history of habeas corpus will it be found that successive applications for the writ were intended to be barred. The right to the great liberty writ lodged in the people is not one to be lightly refined away simply to serve judicial convenience.

What must not be lost sight of is that the constitutional prohibition against the suspension of the writ wisely was intended to safeguard in the judicial branch of government the power to discharge illegally held prisoners, the power being the judicial counterpart of executive pardoning power. Under the common law and by statute the application for the writ may be made to justices, judges and courts successively—it being intended that one in the line might grant a deserved relief even though the others might refuse it. Tom Mooney would not have suffered such a long period of imprisonment had applications for the writ been presented to successive judges and one have been impressed by the injustice done him. The right to entertain an application for the writ carries the judicial right to exercise a veto power over unjust imprisonment—in like manner as a jury exercises a veto power over unpopular law—and as does the President in the exercise of his pardoning power. Consequently, we view with increasing alarm the tendency of the Courts to strip the ancient privilege of the writ of its incidents and to destroy its efficacy.

THE FIRST APPLICATION.

The respondent urges (page 11 of his Brief) that the dismissal of the petitioner's first application for a writ (*McDonald v. Hudspeth* (CCA-10), 113 Fed. (2d) 984), operates as a bar to his present application. In that case the issue whether his detention in jail for

some ten (10) months preceding trial was repugnant to the 6th Amendment's guaranty of a speedy trial and to the due process clause of the 5th was decided against him. (The decision was clearly erroneous on that issue as a matter of law inasmuch as no power is lodged in a judicial division to nullify a constitutional guaranty. The opinion exhibits little judicial concern for McDonald's constitutional rights.) The issue of a denial of counsel was also raised and decided adversely to him. That decision was rendered on July 26, 1940, *before* the Supreme Court decided *Glasser v. U. S.*, 315 U. S. 60, on January 19, 1942. The decision was erroneous as a matter of law on this issue under the later decided *Glasser* rule.

Therefore, the respondent's argument is that the misapplication of a fundamental rule of organic law by a Court does not justify a prisoner thereafter from seeking relief therefrom. He also argues, at least impliedly, that when the Supreme Court decides a novel point of law or overrules a prior rule of law that those whose rights are affected thereby may not avail themselves of its benefits. Attention is drawn to the fact that although the Tenth Circuit Court's opinion reveals a denial of counsel in its narration of facts that Court drew the erroneous conclusion of law that no violation of the constitutional guaranty of counsel and of due process of law had occurred. The *Glasser* decision rendered its conclusions of law erroneous. Attention also is drawn to the fact that the right to an award of the writ and a discharge from custody depends upon the validity of the detention at the time

the matter is passed upon by the Court. See *Mensevich v. Tod,* 264 U. S. 134, 137, where the rule is stated as follows:

> "The validity of a detention questioned by a petition for habeas corpus is to be determined by the condition existing at the time of the final decision thereon. *Stallings v. Splain,* 253 U. S. 339, 343."

Consequently, the validity of the detention of McDonald is determined at the present time by the rule of law recently announced in *Glasser v. U. S.,* 315 U. S. 60, and thereunder there can be no doubt that his detention is unlawful and that he is entitled to an absolute discharge from custody.

THE SECOND APPLICATION.

The respondent also urges that the dismissal of the petitioner's second application for the writ (*McDonald v. Hudspeth* (CCA-10), 129 Fed. (2d) 196, decided Aug. 4, 1942), which raised the same issues as had been raised in the earlier case, 113 Fed. (2d) 984, bars his present application. In its opinion that Appellate Court sets forth facts showing an unmistakable denial of counsel but that Court, nevertheless, drew the conclusion of law that no violation of the constitutional guaranties of counsel and due process occurred. The decision was rendered *after* the Supreme Court decided the *Glasser* case. That Court overlooked the application of the *Glasser* rule and, consequently, its decision was erroneous as a matter of law. The re-

spondent (on page 15 of his Brief) asserts that the Glasser decision was mentioned in the opening brief of the petitioner which was filed in that Court. However, we conclude, as did the Court below, that the Tenth Circuit Court overlooked the Glasser opinion in deciding the case and that its oversight resulted in its erroneous decision. To conclude otherwise would seem to charge the Tenth Circuit Court with lawlessness in defying the decision of the Supreme Court in the *Glasser* case. While we do not believe the Tenth Circuit Court to be infallible we do not think it deliberately would defy the Supreme Court's announced rule, consequently, we assert it persisted in error because it, too, possesses human attributes.

THE COURT BELOW PROPERLY TOOK JUDICIAL NOTICE OF PRIOR ERRORS OF LAW.

There can be no doubt that the Court below had judicial knowledge that the denial of counsel was admitted by the respondent's pleadings and that the recitals of the petition for the writ (R. 2) and of its exhibits (R. 9, 30 and 31) were true. There would seem to be no doubt that it was authorized to take judicial notice of proceeding No. 23,414 which had been before it and of this Court's opinion in *McDonald v. Johnston,* 149 Fed. (2d) 768, on the appeal therefrom. That proceeding did not involve the issue raised in the present appeal. There would also seem to be no doubt that the Court below properly took judicial notice of the factual recitations in the opinions of the Tenth

Circuit Court in the two prior cases entitled *McDonald v. Hudspeth,* 113 Fed. (2d) 984 and 129 Fed. (2d) 196, which demonstrates a deprivation of the right to counsel. See *Wells v. U. S.,* 318 U. S. 257, 260. There would also appear to be no doubt that the Court below was authorized to take judicial cognizance of the rule announced in the *Glasser* case, supra, and no doubt that it was its duty to apply that rule to the case at bar.

The respondent (appellant herein) now asserts the recitations of fact in the appellate opinions on the two prior applications of the petitioner, both of which demonstrate a deprivation of counsel, are true but that the erroneous conclusions of law drawn therein bar the present application and that, therefore, a hearing on facts proven therein and admitted by the pleadings herein is required herein. We are at a loss to learn what purpose such a hearing would serve. It is evident the respondent could not deny the fact of the deprivation of counsel and, consequently, admitted it by his pleadings herein.

THE JUDGMENT OF CONVICTION BEING VOID AND INCURABLE THE PETITIONER MUST BE DISCHARGED.

Where an accused person is deprived of his substantive constitutional right to counsel the trial Court loses jurisdiction over the cause at the time of the deprivation and a judgment of conviction subsequently entered therein is void. (*Johnson v. Zerbst,* 304 U. S.

458, 468, following the rule announced in *Frank v. Mangum,* 237 U. S. 309, 327; *Powell v. Alabama,* 287 U. S. 45; *Glasser v. U. S.,* 315 U. S. 60.) An application for a writ of habeas corpus is a proper remedy to pursue to obtain a discharge from detention where the illegality of the commitment arises from a deprivation of counsel. (*Johnson v. Zerbst,* supra; *Walker v. Johnston,* 312 U. S. 275, 286; *Hawk v. Olson,* 66 S. Ct. 116.)

It is the general rule that a defective sentence is curable. This cure is dependent upon whether the Court seeking to correct it has jurisdiction over the cause and over the person of the defendant. McDonald is in the custody of the federal authorities in California; the trial Court is situated in Michigan. The trial Court has no jurisdiction over him for want of his presence and none over the cause because the term of Court in which he was illegally convicted and sentenced expired some eight (8) years ago. The Court below had jurisdiction over him in habeas corpus but none over the cause in which he was convicted. It is not an agent of the trial Court. It cannot delegate its own duties or jurisdiction to the trial Court. See *Holiday v. Johnston,* 313 U. S. 342, 352. It cannot bestow upon the trial Court the jurisdiction that Court lost. Consequently, the Court below could not remand its cause to Michigan, could not revive the jurisdiction the trial Court lost and could not return McDonald to Michigan because, in habeas corpus, the jurisdiction of the Court is limited to ordering or refusing a discharge.

A return of the prisoner to Michigan would not empower the Michigan Court to disturb the verdict, judgment of conviction or the sentence imposed upon him because the term of Court in which they were entered long has expired. See *U. S. v. Mayer,* 235 U. S. 55, 67, so deciding as to a judgment of conviction, and *U. S. v. Benz,* 282 U. S. 304, 307, so deciding as to a sentence. In *Bryant v. U. S.* (CCA-8), 214 Fed. 51, an illegal sentence was said to be correctible whether or not the trial Court's term had expired. The reason assigned for that conclusion was that Bryant had elected to pursue his immediate remedy for release from custody through the instrumentality of an application for a writ of habeas corpus and thereby "put in motion the machinery" which prevented a correction of the sentence by the usual method of an appeal from the judgment or by a motion to vacate or amend the same. Attention is drawn to the fact that McDonald was not responsible for the error which voided the judgment and did not "put in motion" any machinery preventing the correction of the void judgment and sentence as Bryant had done. He attacked the validity of the sentences imposed upon him. See *McDonald v. Moinet* (CCA-6), 139 Fed. (2d) 939, an opinion on appeal from an order denying his motion to vacate sentences. Consequently, the trial Court alone was responsible for the void judgment and the Tenth Circuit Court was responsible for the failure to order his discharge in habeas corpus.

The remedy by habeas corpus is designed to avoid the effects of a void judgment of conviction. It neither

modifies nor revises the judgment of conviction. Its purpose is not to set aside the judgment but to release the prisoner from detention, leaving the judgment undisturbed. It does not perform the office of a writ of error or appeal. (*McNally v. Hill,* 293 U. S. 131, 139; *Harlan v. McGourin,* 218 U. S. 442.) Obviously, a Court sitting in habeas corpus in California cannot correct, modify or alter the void judgment of conviction and the void sentence entered in Michigan. It has no jurisdiction over the trial proceeding whatever. It has no power to interfere with that proceeding. It cannot restore to that Court the jurisdiction it lost.

The most that a Court sitting in habeas corpus is empowered to do is to discharge a prisoner from custody. It is settled that where a commitment arises out of a defective sentence it must order the prisoner discharged. It may notify the committing authorities of the time and place it intends to discharge the prisoner whereupon those authorities may take what steps they may wish and, if authorized, may arrest him or commence extradition proceedings against the prisoner. (*In re Bonner,* 151 U. S. 142; *In re Medley,* 134 U. S. 160-164; *Biddle v. Thiele* (CCA-8), 11 Fed. (2d) 235, 237; *In re Christian,* 82 Fed. 885.) (In *Price v. Zerbst* (DC-Ga.), 268 Fed. 72, 74, the Court misconstrued the Bonner decision as authorizing a petitioner to be remitted to a trial Court for correction of a sentence. In *McCleary v. Hudspeth* (CCA-10), 124 Fed. (2d) 445, 447, the Circuit Court fell into the same error as is apparent from each citation it sets forth for its conclusion.)

Obviously a court sitting in habeas corpus is not authorized to treat a petition for the writ as though it were an application for the extradition of the petitioner. If it does it exceeds its jurisdiction and the result is an extension of the wrongful imprisonment of the petitioner. Such a Court is not authorized to initiate extradition proceedings or proceedings in the nature thereof against a restrained person. It has no statutory authority to act as a volunteer agent of the committing authorities. The order below remanding McDonald to Michigan is invalid for being an unauthorized attempt to extradite him.

The rule appears to be settled that a Court must order the discharge of a prisoner in habeas corpus proceedings where a sentence is void. Although it may notify the committing authorities of the time and place of the intended discharge no appellate opinion is to be found declaring that such a notification should be given where a judgment of conviction is void. In the instant case such a notification would be of no value or importance, except for statistical purposes, inasmuch as the trial Court is barred from trying McDonald upon the indictment because, by reason of the elapse of time, he cannot now be granted the speedy trial to which he was entitled in 1939. A trial some eight (8) years after his arraignment would violate the speedy trial guaranty of the 6th Amendment and the due process guaranty of the 5th Amendment.

Where a judgment of conviction, as distinguished from a mere sentence, is void the rule seems to be that

it is the duty of a Court sitting in habeas corpus to order the prisoner discharged. See *Ex parte Nielsen,* 131 U. S. 176; *McNally v. Hill,* 293 U. S. 131, 137-139; *In re Bonner,* supra; *In re Medley,* supra; *Ex parte Novotny* (CCA-7), 88 Fed. (2d) 72, 74; *Mackey v. Miller* (CCA-9), 126 Fed. 161; *Ex parte Sharp* (DC-Kan.), 33 Fed. Supp. 464, and *Walker v. Johnston,* 312 U. S. 275. The reason therefor seems to be that a remand of the cause to the trial Court and a return of the prisoner to its jurisdiction is improper and purposeless inasmuch as the trial Court is not empowered to correct a void judgment of conviction. In the *Bryant* case a remand for correction of a sentence was held proper because the defect "did not inhere in the trial or verdict". The opinion indicates that a remand would be improper in a case involving a void conviction. In *U. S. ex rel. Nortner v. Hiatt* (DC-Penn.), 33 Fed. Supp. 545, 546, where a writ of habeas corpus was applied for on the ground the trial Court had deprived the petitioner of counsel it was held that the Court, sitting in habeas corpus, could not remand him "to the custody of the court which sentenced him" but, following the *Bonner* rule, would notify the committing authorities of the time and place it intended to discharge him from custody. In *In re Bonner,* 151 U. S. 142, it was recognized that a prisoner would be entitled to a discharge absolute where a judgment of conviction was not subject to correction, the Court there stating:

> "In some cases, it is true that no correction can be made of the judgment, as where the court had, under the law, no jurisdiction of the case,—that

is, no right to take cognizance of the offense alleged,—and the prisoner must then be entirely discharged; * * *."

It is apparent that the trial Court is not empowered to retry McDonald upon the indictment or to take any action thereon. That Court lost jurisdiction over the cause at the time it deprived him of the assistance of counsel in 1939. McDonald has been unlawfully imprisoned for some eight (8) years without having been accorded the type of trial guaranteed by the 6th Amendment. In short, he has been imprisoned for that period of time without a trial. Further proceedings upon the indictment are barred by the speedy trial guaranty of the 6th Amendment and the due process clause of the 5th Amendment. Compare *In re Alpine,* 203 Cal. 731, 736, 265 Pac. 947; *Harris v. Municipal Court,* 209 Cal. 55, 285 Pac. 699, and *In re Gergerow,* 133 Cal. 349, 354.

CONCLUSION.

The verdict, judgment and conviction and sentence under which McDonald is committed are void because the trial Court lost jurisdiction over the proceeding by virtue of the deprivation of counsel for which it alone was responsible. The petitioner was not responsible for the lost jurisdiction. He has, nevertheless, been held in jail for years awaiting such a trial on a criminal charge as is guaranteed by the 6th Amendment and the due process clause of the 5th Amendment. He

has not been given such a trial. In 1939 he was subjected to a psuedo-trial violating the constitutional guaranty. As a result he has been jailed unlawfully for eight years without trial. The Michigan trial Court now cannot proceed on the indictment against him inasmuch as to do so would violate the speedy trial provision of the 6th Amendment and the due process clause of the 5th Amendment. It is the duty of the Court in habeas corpus to discharge him from detention.

Wherefore we submit that the Court must order the petitioner discharged from custody either with or without notice being given the Michigan authorities of the time and place of his discharge or remand the cause to the Court below with instructions so to do.

Dated, San Francisco, California,
June 17, 1946.

Respectfully submitted,
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Attorney for Appellee
and Cross-Appellant.